Petition

81-1256

Office - Supreme Court, U.S.
FILED
JAN 5 1982
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No.

STATE OF NEW MEXICO and ALEX J. ARMIJO,
Commissioner of Public Lands,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

THOMAS L. DUNIGAN
Deputy Attorney General
Post Office Drawer 1508
Santa Fe, New Mexico 87501
(505) 982-6000

WILLIAM O. JORDAN
Special Assistant Attorney General
Post Office Box 1148
Santa Fe, New Mexico 87501
(505) 827-2743

J. SCOTT HALL
Special Assistant Attorney General
Post Office Box 1148
Santa Fe, New Mexico 87501
(505) 827-2743

QUESTIONS PRESENTED

The Arizona-New Mexico Enabling Act (Act of June 20, 1910, 36 Statutes at Large 557, Chapter 310), reads in part, as follows:

> It is hereby declared that all lands hereby granted, including those which, having been heretofore granted to said territory, are hereby expressly transferred to the said state and shall be by the said state held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified . . . .

1. Whether the Arizona-New Mexico Enabling Act prohibits the United States Government from obtaining benefits in the form of easements and rights-of-way reserved upon lands ceded by Congress to the State of New Mexico for specifically enumerated purposes without compensating the state.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. The Factual Background	2
B. Proceedings in the Courts Below	4
REASONS FOR GRANTING THE PETITION	5
CONCLUSION	10

TABLE OF CITATIONS

	Page
CASES	
Application of Dasburg, 45 N.M. 184, 113 P.2d 579	5
Lassen v. *Arizona ex rel. Arizona Highway Department* 385 U.S. 458, 87 S.Ct. 584, 17 L.Ed.2d 515	5
Lea County Water Company v. *Reeves*, 43 N.M. 221, 89 P.2d 607	3,5
Oregon ex rel. State Land Board v. *Corvallis Sand and Gravel Company, et al.*, 429 U.S. 363, 97 S.Ct. 582, 50 L.Ed.2d 550 (1977)	3
State ex rel. Highway Commission v. *Walker*, 61 N.M. 374, 301 P.2d 317	5
U.S. v. *Ervien*, 251 U.S. 41, 40 S.Ct. 75, 64 L.Ed. 128	7
STATUTES	
Arizona-New Mexico Enabling Act, Section10 (Act of June 20, 1910, 36 Statutes at Large 557, Chapter 310)	5,6
25 Stat. 357 (1888), 40 U.S.C. 257	4
70 A Stat. 148 (1956), 10 U.S.C. 2663	4
19-7-28 N.M.S.A., 1978 Comp.	3
19-7-53 N.M.S.A., 1978 Comp.	3
RULES	
Rule 71 A (h) F.R. Civ. P.	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No.

STATE OF NEW MEXICO and ALEX J. ARMIJO,
Commissioner of Public Lands,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The State of New Mexico and Alex J. Armijo, its Commissioner of Public Lands, petition for a writ of certiorari to review the Opinion and Judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The Judgment entered in this case by the United States District Court for the District of New Mexico on November 15, 1979 (App. A, pp. 1a-3a) is unreported. The Judgment (App. B, p. 4a-5a), and Opinion of April 8, 1981, of the United States Court of Appeals for the Tenth Circuit (App. C, pp. 6a-15a) are also unreported. The Circuit Court's subsequent Order of October 7, 1981 (App. D, p. 16a-17a) and the second Judgment of the District Court of November 19, 1981 (App. E, pp. 18a-20a) are unreported as well.

JURISDICTION

The Judgment of the United States Court of Appeals for the Tenth Circuit was entered on October 7, 1981, in accordance with its Opinion filed on April 8, 1981. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Material portions of pertinent constitutional and statutory provisions are included in the Appendix at pp. 21a-26a.

STATEMENT OF THE CASE

A. The Factual Background

This case involves the means by which the federal government acquires for military purposes by way of eminent domain, lands belonging to the State of New Mexico and the compensation due the state therefore.

The state lands in question were acquired by clear list and patent from the U.S. Government many years prior to the initiation of this action, and they were acquired under the provisions of the New Mexico Enabling Act, being the Act of June 20, 1910 (36 Stats. at Large 557, Chapter 310).

The general background and facts are that the Government was engaged in firing missiles between Green River, Utah, and the White Sands Missile Range in central New Mexico. Along the route was a tract of land designated as Athena "H" fallout site over which malfunctioning missiles could be aborted and permitted to fall to earth. The ranch of Mr. Taylor lies within this area, and portions of said ranch were owned by Taylor either in fee simple or by purchase contract from the State of New Mexico, 16,948.99 acres were owned by the State of New Mexico and leased by the Commissioner of Public Lands to Taylor for grazing purposes.

Among the interests conveyed to Taylor by the State was a five-year grazing lease covering 16,948.99 acres. This grazing lease granted to Taylor the right to utilize the land for grazing purposes only, the state having reserved *all* other rights. Bearing in mind the U.S. Supreme Court in *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Company, et al.*, 429 U.S. 363, 97 S.Ct. 582, 50 L.Ed.2d 550 (1977) held that under our federal system, property ownership is not governed by general federal laws, but rather by the laws of the several states and that the great body of law in this county which controls acquisition, transmission, and transfer of property defines the rights of its owners in relation to the state or to private parties is found in the statutes and the decisions of the states. We, therefore, turn to the state decisions and statutes. In *Lea County Water Company v. Reeves*, 43 N.M. 221, 89 P.2d 607, the identical reservations in the lease issued to Taylor were considered as were the same statutes, being § 7-8-61 and § 7-8-29, N.M.S.A., 1953 Comp., which is now found in § 19-7-57 and § 19-7-28. N.M.S.A., 1978 Comp., respectively. In that case, the court held that the lessee had the grazing rights only and all other rights were reserved to the state. Thus, when the state issued its lease to Taylor, it reserved to the state the right to grant easements and rights-of-way for all purposes to third parties in the same 16,948.99 acres.

While Taylor's lease with these reservations was in effect, the Government filed the two suits to condemn for its use, some of these reserved rights. The rights taken may be summarized as follows:

A. The right to require of the state's lessees and their families, etc., to vacate the land from time to time upon notice.

B. The right of the Commanding General of the White Sands Missile Range or his representative to require owners or any of the lessees, employees, etc., to vacate the property.

C. The right of the Government and its agents to go upon the lands to give notice to assure that the lands are vacated.

D. The right to the Government and its agents to go upon the lands after firings to investigate claims for damages or losses, and to search for and recover any missiles which might have fallen.

E. The right to the Government and its agents to go upon the lands to erect such sign boards as the Government deems are necessary.

B. Proceedings in the Courts Below

Invoking its authority found at Acts of Congress approved August 1, 1888 (25 Stat. 357, 40 U.S.C. 257), and August 10, 1956 (70 A Stat. 148 10 U.S.C. 2663), the Government filed suit against Taylor and the Commissioner to condemn rights in these lands necessary for its fallout area and necessary for its missile testing program. The two takings commencing in March of 1972 cover a total period of 13 months in duration. The Government took immediate possession and the matter of compensation was tried before a commission pursuant to Rule 71A(h) F.R.Civ.P. The United States District Court accepted the recommendations of the commission in the consolidated cases and entered two judgments—one to Taylor in the amount of $33,375 covering Taylor's interest in fee purchase contract and state grazing lease lands and one judgment to the Commissioner in the amount of $4,237.25 for the taking of the interest reserved from the Taylor lease.

Final judgment of the District Court granting money as just compensation to the State of New Mexico was entered on November 15, 1979. Invoking the jurisdiction of the United States Court of Appeals for the Tenth Circuit pursuant to 28 U.S.C. 1291, the Government filed its Notice of Appeal on November 29, 1979.

Among the issues brought by it on appeal, the Government specifically asked whether the Commission may award damages to the State which has leased its lands for grazing when

there is little evidence that the land is likely to be put to any use besides grazing in the future, or that uses reserved by the State would be impaired by the evacuation estate taken.

On that particular issue, the Court of Appeals reversed the United States District Court, holding that the evidence was insufficient to demonstrate a reasonably probable future use for rights reserved to the State for granting rights-of-way, easements, and the like.

REASONS FOR GRANTING THE PETITION

Because this case must be viewed against the statutory background of the Arizona-New Mexico Enabling Act, Section 10 (Act of June 20, 1910, 36 Stats. at Large 557, Chapter 310), the issue presented is whether the United States Government is entitled to take for its own use lands and interests in lands belonging to the State and held in trust for certain specifically enumerated beneficicary institutions without compensation.

The Government in filing the suits against the State has taken interests which are compensable, and although the Government subsequently used the lands, it is immaterial whether or not it utilized the rights it has condemned and taken. In *Lea County Water Company* v. *Reeves,* 43 N.M. 221, 89 P.2d 607, the right to issue rights-of-way and easements was reserved to the State. Without either a right-of-way issued by the Commissioner of Public Lands, pursuant to § 19-7-28, N.M.S.A., 1978 Comp, or without filing of these suits, the Government's agents would have been guilty of criminal trespass. Also, Section 10 of the New Mexico Enabling Act, *supra,* makes it unlawful for any party to use any of the State trust lands such as the 16,948.99 acres without making adequate compensation to the State therefor. In short, any contract agreement or even a State statute providing for use or disposition of any of the lands, without paying true value therefor is null and void. See *Application of Dasburg,* 45 N.M. 184, page 191; 113 P.2d 569; *State ex rel. Highway Commission* v. *Walker,* 61 N.M. 374, 301 P.2d 317; and *Lassen* v. *Arizona ex rel. Arizona Highway Department,* 385 U.S. 458, 87 S.Ct. 584, 17 L.Ed.2d 515 (1967).

In its Opinion, the Tenth Circuit Court of Appeals ignored completely the conclusive authority of the Arizona-New Mexico Enabling Act, *supra,* as interpreted by this Court in *Lassen, supra,* to the effect that the laws and principles pertaining to eminent domain cannot be applied to Arizona and New Mexico trust lands so as to diminish compensation due said states, nor may the condemnor, being the United States Government herein, receive a benefit from said lands without full compensation to the trust for the reason that the lands and the natural products thereof are strictly dedicated to other specific purposes.

Although it is recognized that the *Lassen* case was not an eminent domain case, the decision discussed and applied the law as though an eminent domain proceeding was or would be the forum for format in which the issue of compensation would be determined. In that case, the U.S. Supreme Court struck down an Arizona statute which provided that road easements taken by the State Highway Department were conclusively presumed to have increased the value of the remaining land and, therefore, such increase in value would be offset against the value of the easement taken, all of which would result in the Highway Department receiving a road easement without compensating the trust beneficiaries.

The U.S. Attorney General, who had intervened, urged the Court to adopt a ruling that the taking would be considered on its own merits and if there was an enhancement, it would be offset against the appraised value of the land. Thus, in some instances, the State would be paid for the road right-of-way easement taken by the Highway Department and others it would not. In rejecting both of these positions, the Court said commencing at page 468:

> "The conclusive presumption of enhancement which the Arizona Supreme Court found does not in our view adequately assure fulfillment of that purpose, particularly in the context of lands that are as variegated and far-flung as those comprised in this grant. And we think that the more particularized

showing of enhancement advocated by the United States, resting as it largely would upon the forecasts of experts which by nature are subject to the imponderables and hazards of the future, also falls short of assuring accomplishment of the basic intendment of Congress. Acceptance of either of these courses for reimbursing the trust in these circumstances might well result in diminishing the benefits conferred by Congress and in effect deflecting a portion of them to the State's highway program.

We hold therefore that Arizona must actually compensate the trust in money for the full appraised value of any material sites or rights of way which it obtains on or over trust lands. This standard most nearly reproduces the results of the auction prescribed by the Act, and most consistently reflects the essential purposes of the grant."

While it is noted that conventional made Court rules relating to eminent domain place upon a condemnee a burden to show that he has suffered a *loss,* it is submitted that the U.S. Supreme Court in *Lassen* goes a step further in the opposite direction where trust lands are involved and held that the Federal statute, being the Arizona-New Mexico Enabling Act, prohibits othe. from *profiting* from the trust, or even using trust property without payment to the trust at the appraised price or the minimum set by law or rules. This is evidenced from the language of the Court throughout, especially at page 467 of the U.S. Reports which reads as follows:

"The Act originally provided in addition the trust lands should not be sold for a price less than a statutory minimum. Second, it imposes a series of careful restrictions upon the use of trust funds. As this Court has noted, the Acts contains 'a specific enumeration of the purposes for which the lands were granted and the enumeration is necessarily exclusive of any other purpose.' *U.S. v. Ervien,* 251 U.S. 41, 40 S.Ct. 75, 64 L.Ed. 128. The Act thus specifically forbids the *use* of 'money *or thing of value* directly or

> indirectly derived' from trust lands for any purposes other than those for which that parcel of land was granted. It requires the creation of separate trust accounts for each of the designated beneficiaries, prohibits the transfer of funds among the accounts, and directs with great precision their administration. 'Words more clearly designed... to create definite and specific trust to make them in all respects separate and independent of each other could hardly have been chosen.' *United States v. Ervien,* 246 F. 277, 279. All these restrictions in combination indicate Congress' concern both that the grants provide the most substantial support possible to the beneficiaries *and that only those beneficiaries profit from the trust."* (Underscoring supplied.)

It is noted that the footnotes under *Lassen* indicate that the $3.00 per acre minimum price in Arizona was removed, and it is further noted that such still remains in Section 10 of the New Mexico Enabling Act.

The U.S. Government took by condemnation rights-of-way and easements for an unlimited right to drop missiles upon the land, to go upon the land and search for said missiles, to remove same, to post signs thereon, and even to remove the State's other lessees. The Government now contends that the conventional eminent domain rules should be used to determine compensation and thereby diminish the value as set by the Enabling Act, by appraisal, and by the Commissioner's Rules. It thus contends that it may have a free rights-of-way, that is to say, a benefit from these trust lands, without having to make compensation therefor. It is submitted that the application of these conventional rules made by the Court would have the same effect as the Arizona Enhancement Statute; and in the words of the Court in *Lassen* quoted above "might well result in diminishing the benefits conferred by Congress and in effect deflecting a portion of them to the . . ." and substitute the U.S. Government for the Arizona Highway Department. The decision as now written following the conventional rules would set a precedent which would affect all of the Western public land states wherein the U.S. Government desires a right-of-way

of any kind across trust lands. Instead of applying and paying for an easement and right-of-way as any other party, it would file an eminent domain proceeding instead and would thereby receive a free easement in any instance where the Commissioner could not show that others were interested in acquiring the same right. Indeed, the important of the issue is reflected in several other Western states indicating their interest in joining as amicae in this proceeding.

Section 10 of the Enabling Act reads, in part, as follows:

> Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than that for which such particular lands, or the land from which such money or thing of value shall have been derived, were granted or confirmed, or in any manner contrary to the provisions of this act, shall be deemed a breach of trust. . . ."

As explained, both the U.S. Supreme Court and the New Mexico Supreme Court have held that the issuance or taking of an easement or right-of-way constitutes a "disposition" under this Section for which compensation must be made to the trust.

It is submitted that the rationale of the U.S. Supreme Court in *Lassen* dictates that with regard to trust lands granted to Arizona and New Mexico under the Enabling Act, no *use* or *benefit* can pass to third parties free of charge and that no statute or rule of judge-made law may be applied or construed to effect that result. All such benefits must flow only to the beneficiaries designated by the Act—not even the state's own agencies, such as the Highway Department, may receive such free use or benefit, let alone any third party such as the U.S. Government. To paraphrase the Supreme Court in *Lassen,* any other standard would not reflect the essential purposes of the grant.

It is submitted that the U.S. Government should be directed to pay the State of New Mexico the relatively small sum of $4,237.35 to establish a precedent for the future that the Government should pay to the trust full money value for any

and all rights-of-way across state trust lands in the same manner as the New Mexico Highway Department and other third parties to pay to the trust, instead of resorting to eminent domain to apply eminent domain rules to circumvent the trust.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

WILLIAM O. JORDAN
Special Assistant Attorney General
Post Office Box 1148
Santa Fe, New Mexico 87501
(505) 827-2743

THOMAS L. DUNIGAN
Deputy Attorney General
Post Office Drawer 1508
Santa Fe, New Mexico 87501
(505) 982-6000

J. SCOTT HALL
Special Assistant Attorney General
Post Office Box 1148
Santa Fe, New Mexico 87501
(505) 827-2743

Appendix

INDEX TO APPENDIX

		Page
APPENDIX A	—Judgment of the United States District Court for the District of New Mexico	1a
APPENDIX B	—Judgment of the United States Court of Appeals for the Tenth Circuit	4a
APPENDIX C	—Opinion of the United States Court of Appeals for the Tenth Circuit	6a
APPENDIX D	—Order of the United States Court of Appeals for the Tenth Circuit	16a
APPENDIX E	—Judgment of the United States District Court for the District of New Mexico	18a
APPENDIX F	—Statutory Text, Section 19-7-28 N.M.S.A., 1978 Comp.	21a
APPENDIX G	—Statutory Text, Section 19-7-57 N.M.S.A., 1978 Comp.	22a
APPENDIX H	—Arizona—New Mexico Enabling Act, Section 10, (Act of June 20, 1910, 36 Statutes at Large, 557, Chapter 310)	23a

APPENDIX A

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil No. 9746 and 10.030
(Consolidated)
Parcels 1 and 2
(State of N. M. Interests)

UNITED STATES OF AMERICA,
Plaintiff,

vs.

77,819.00 Acres of Land, etc.
and Jay Taylor, et al.,
Defendants.

FINAL JUDGMENT

THIS MATTER having come before the Court for entry of Final Judgment and the Court being fully advised in the premises, FINDS:

1. That the Court has jurisdiction in this matter.

2. That the Plaintiff, United States of America, by complaint and declaration of taking filed in Civil No. 9746 was vested with an evacuation and entry easement over and on the property of the Defendant, State of New Mexico, as more fully described in the Declaration of Taking, for the period September 1, 1972 through March 31, 1973.

3. That the Plaintiff, United States of America, by complaint and declaration of taking filed in Civil No. 10,030 was vested with an evacuation and entry easement over and on the

property of the Defendant, State of New Mexico, as more fully described in the declaration of taking, for the period April 1, 1973 through September 30, 1973.

4. That the Commissioners' Report found value of the State's reserved interests in State leased grazing land acquired by Plaintiff was $.25 an acre, but that total average affected was not determined.

5. That the parties have stipulated for entry of judgment that State interests were acquired by the Plaintiff in 16,948.99 acres of State leased lands that total just compensation is therefor $4, 237.25, with interest.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED:

A. That the Commissioners' Report is adopted and approved.

B. That by authority of Declaration of Taking filed in Civil Nos. 9746 and 10,030, the Plaintiff became vested with a right to evacuate and entry easement over and on the property of the Defendant for the period September 1, 1972 through September 30, 1973, a total 13-month period.

C. That the sum of $2,118.63 for the seven-month taking in Civil No. 9746 is hereby awarded the Defendant, State of New Mexico, with six (6%) per cent interest from September 1, 1972, to the date it is paid and that the sum of $2,118.62 for the six-month taking in Civil No. 10.030 is hereby awarded the Defendant, State of New Mexico, with six (6%) per cent interest from April 1, 1973, to the date it is paid.

D. That the Plaintiff shall deposit the sum with interest as allocated above into the Registry of the Court.

E. That said sums with interest, payable to the State of New Mexico, are to be delivered by the Clerk to the Office of the United States Attorney, District of New Mexico, for delivery to the Defendant, State of New Mexico, and this matter is considered fully and finally settled.

_____

UNITED STATES DISTRICT JUDGE

STATE OF NEW MEXICO
Commissioner of Public Lands

By _____

WILLIAM O. JORDAN, Esq.
General Counsel
P.O. Box 1148
Santa Fe, New Mexico 87501

APPROVED:

R. E. THOMPSON
United States Attorney

JAMES B. GRANT
Assistant U.S. Attorney

_____

RAYMOND HAMILTON
Special Assistant U.S. Attorney
P.O. Box 607, Albuq., N.M. 87103

APPENDIX B

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

Nos. 79-2087 and 79-2270

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

77,810.10 ACRES OF LAND, more or less,
situate in Socorro and Catron Counties, New Mexico:
JAY TAYLOR a/k/a Jay L. Taylor and IMOGENE H. TAYLOR
a/k/a Imogene Herring Taylor, his wife:
THE STATE OF NEW MEXICO
BY COMMISSIONER OF PUBLIC LANDS,
Defendants-Appellees.

Appeal from the United States District Court
For the District of New Mexico
(D.C. Nos. Civil 9746 and 10030)

David C. Shilton, Attorney, Department of Justice, Washington, D.C. (James W. Moorman, Assistant Attorney General, Edward Shawaker, Attorney, Department of Justice, Washington, D.C. ; and R. E. Thompson, United States Attorney and James B. Grant, Assistant United States Attorney, Albuquerque, New Mexico, with him on the brief), for Plaintiff—Appellant.

Robert D. Tatchert or Rodey, Dickeson, Sloan, Akin & Robb, Albuquerque, New Mexico, for Defendants—Appellees Jay Taylor and Imogene H. Taylor.

William O. Jordan, Attorney for the Commissioner of Public Lands for the State of New Mexico, Santa Fe, New Mexico, for Defendant—Appellee The State of New Mexico.

Before HOLLOWAY, HARRETT and DOYLE, Circuit Judges.

BARRETT, Circuit Judge.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MARCH TERM—April 8, 1981

**Before Honorable William J. Holloway, Jr.,
Honorable James E. Barrett, and
Honorable William E. Doyle, Circuit Judges**

**JUDGMENT
No. 79-2087
No. 79-2270
(D.C. No. 9746 and
No. 10030)**

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

vs.

77,819.10 Acres of Land, more or less, situate in Socorro and Catron Counties, New Mexico; Jay Taylor aka Jay L. Taylor and Imogene H. Taylor aka Imogene Herring Taylor, his wife, the Federal Land Bank of Wichita, The State of New Mexico by Commissioner of Public Lands; County Treasurer of Socorro County, County Treasurer of Catron County, and UNKNOWN OWNERS.

Defendants-Appellees.

This cause came on to be heard on the record on appeal from the United States District Court for the District of , and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of the court is reversed as to the award rendered on behalf of the state. The district court's judgment is affirmed in all other particulars.

HOWARD K. PHILLIPS, Clerk

The United States appeals an award made by a commission and adopted by the district court pursuant to a condemnation proceeding for the taking of an evacuation estate[1] to be used in connection with the Athena H Missile project at the White Sands Missile Range in New Mexico. The commission appointed by the Court under Fed. Rules Civ. Proc. rule 71A(h), 28 U.S.C.A. awarded landowners, Jay Taylor and Imogene Taylor (Taylors) and the State of New Mexico (State), $33,735 and $4,237.25, respectively, and the Court entered judgment based upon the commission's report. This Court's jurisdiction rests on 28 U.S.C.A. § 1291.

Factual Background

The facts are not in dispute. The United States filed complaints in 1972 and 1973 taking two successive evacuation estates over 77,810.10 acres of land, more or less, contained within the Taylor ranch. The duration of the taking totaled 13 months. The Taylors used the land for grazing cattle. They owned approximately 58,131 of the acres involved and leased another 19,949.99 acres from the State. The State, in granting the Taylors the grazing lease, reserved all other interests in the land, including but not limited to, granting easements for hunting, fishing, water wells, signs and rights of way.

Mr. Taylor testified concerning a 1963 evacuation agreement with the government in connection with another missile overflight project. He described the disruptive effects prior missile overflights had on his ranch operation, as, "damage to property caused by boosters and other metal debris hitting the ground, helicopters scaring cattle, loss of weight to the cattle, calves becoming lost from their mothers. . ." [R. Vol. I, p. 61]. Taylor related the terms of the prior agreement, including the price paid, $28,000.00.

[1] An evacuation estate is an interest in land enabling the condemnor to require occupants to periodically vacate the land. Here, the United States could require the occupants to leave for periods not exceeding 12 hours, with at least 10 days' notice.

Taylor's expert witness, Charles Crowder (Crowder) was not an expert appraiser, per se; however, the commission determined he was sufficiently qualified to render an opinion pursuant to Fed. Rules Evid. Rule 702, 28 U.S.C.A. Crowder testified that if he were to lease the Taylor ranch, he would discount the rent by at least 50% to adjust for the taking.

The State's expert witness, Lincoln McTeigue (McTeigue), was an appraiser with the New Mexico Land Office. McTeigue appraised the State's reserved interests and determined that the fair annual rental value would be reduced by $1.00 per acre.

The Commission admitted into evidence the State's Exhibit Z to show "the entire project area and Taylor ranch in juxtaposition to that area," (R., Vol. III, p. 124). The United States had no objection to the exhibit's admission "if it's only for that purpose, not because we feel it's relevant," (R., Vol. III, p. 124).

The government's witness, Tye Terrell (Terrell), a farm and ranch appraiser employed by the Corps of Engineers, testified that the diminution in fair rental value of the Taylor ranch would be approximately $700.00,[2] after analyzing purportedly comparable unencumbered ranches and comparable ranches encumbered by similar projects. (R., Vol. I, pp. 64-65).

Commission Findings

The commission found the highest and best use of the Taylor ranch to be for grazing and ranching except for the state-owned tracts which were found to have a remaining highest and best use for water wells, water easements and easements of access.

---

[2] $3.35 per animal unit month (unencumbered fair rental value)
-3.30 per animal unit month (encumbered fair rental value)
.05 diminution in animal unit months
.05 times 13,494 animal units for 13 months equals approximately $700.00.

With respect to the Taylors, the commission concluded the best method for computing the fair market value of the ranch taken was to "determine the last fair rental value of the tract to be taken based upon a fair rental value per animal approach." [R., Vol. I, p. 66]. It was uncontested that 13,494 animal unit months were involved for the 13-month period.

The commission was generally unimpressed with the unencumbered comparables offered by the United States as either being remote in time, distant in location or involving different lease factors. Likewise, the commission was not impressed with the encumbered lease comparables presented by the United States because too many undisclosed factors would have to be considered for each lease. The commission, however, found one unemcumbered comparable to be the "closest reasonable figure" [R., Vol. I, p. 66] at $5.33 per animal unit month, and adjusted the figure downward to $5.00 per animal unit month to account for a different time period and lease term.

The commission found Crowder's testimony regarding the 50% discount applied to overflight encumbered property to be impressive. After applying the 50% discount to the unencumbered monthly rental of $5.00 per animal unit month, the commission found $2.50 to be the fair rental value of the Taylor ranch immediately after the taking. Multiplying $2.50 per animal unit month by 13,494 animal units for 13 months, the commission arrived at $33,735 as the Taylors' fair rental loss resulting from the taking.

With respect to the State, the commission found that the fair rental value of all the tracts was not diminished with the exception of certain designated tracts set forth below. The commission concluded that it was "highly speculative that any of these tracts of land would suffer damage with respect to signing, hunting and fishing, water wells, water easements or right of way potential, particularly when one views the plat offered by the Commissioner of Public Lands of New Mexico as Exhibit Z." [R., Vol. I, p. 65]. Even so, the commission noted with respect to the State property platted in Exhibit Z "that the

only major contiguous portions (to other State lands) of Parcel 2 occurred in Township 1 North, Range 8 West, in Township 1 South, Range 9 West and in Township 1 South, Range 8 West." [R., Vol. I, p. 64]. The commission then found clear potential for right of way easements and water well easements "from this plat in the land of the Commissioner." [R., Vol. I, p. 64] and was of the opinion that more than one highest and best use was available for these tracts. The commission determined that the $1.00 per acre reduction in fair rental value was too high and that a diminution in value of 25 cents per acre was more realistic. The commission reported that "an examination of New Mexico Exhibit Z and Mr. McTeigue's testimony supports this conclusion." [R., Vol. I, p. 66]. However, the commission was unable to reach a final award because "insufficient information was presented to the commission to develop the total number of acres within these townships and ranches and this commission recommends further proceedings before the District Court to determine the actual acreage." [R., Vol. I, p. 66].[3] The district court rejected the Government's objections to the commission's report and entered judgment.

Appellate Contentions

On appeal, the Government contends that: (1) the commission erred in relying on speculative testimony and inadmissible evidence in awarding Taylor damages; and (2) the evidence was insufficient to support an award to the State.

I.

A. Speculative Testimony

The United States claims the testimony of the Taylor's expert witness, Crowder, was speculative and that the commission erred in relying on it.

The commission found Crowder was not titled as an expert appraiser; however, it was determined that he was qualified to

[3] Parties stipulated later that 16,949.99 acres were involved, resulting in an award to the State of $1,237.25.

give an expert opinion regarding the diminution in value missile overflights have on ranches, based upon his skill and experience pursuant to Rule 702, *supra*. The trial court is allowed wide discretion in passing on matters relating to expert testimony in condemnation cases. *United States v. 25.02 Acres of Land, More or Less in Douglas County.* 495 F.2d 1398 (10th Cir. 1974).

Crowder testified that he had very successfully participated in sales of over 3 million acres of ranch property in New Mexico, either individually or corporately and always as a principal. He never used an appraiser; rather, he valued the land himself. In addition, Crowder stated that he was familiar with the Taylor ranch from past business experience and because he had a ranch nearby. In *Phelps v. Atchison, Topeka and Santa Fe R.R. Co.*, 400 F.2d 20 (10th Cir. 1968), this Court held that the trial court properly admitted testimony of an expert witness who had experience as a cattle ranch manager in the area, was familiar with ranch sales in the area and had inspected the ranch property taken. Qualified and knowledgeable witnesses may give their opinion or estimate of the value of the property taken, but to have probative value the opinion must have a rational foundation. *United States* v. *Sowards*, 370 F.2d 87 (10th Cir. 1966) (citing cases). Clearly, this foundation existed.

It is permissible for an expert witness to arrive at his opinion in a way that any man of intelligence would have arrived at a valuation of the property for ordinary business purposes. *United States* v. *97.19 Acres of Land More or Less.* 582 F.2d 878 (10th Cir. 1978).

We hold that Crowder's conclusion that the fair rental value of the Taylor ranch would diminish by 50% after the taking was intelligently and rationally founded and not impermissibly speculative. Commission findings will not be set aside unless the court is left with the firm conviction upon review that a mistake has been committed. *United Staes* v. *494.10 Acres of Land in Cowley County.* 592 F.2d 1130 (10th Cir. 1979); *United States* v. *46,672.95 Acres of Land*, 521 F.2d 13 (10th Cir. 1975). Commission reliance on Crowder's testimony was justified and proper.

B. Inadmissible Evidence

The United States argues that error was committed when the commission allowed Taylor's testimony about the price paid to him by the United States for a prior similar agreement.

The burden rests upon the owner to establish by competent evidence his right to substantial compensation. *United Staes* v. *25.02 Acres of Land, supra.* We have held that while the best evidence of market value is found in sales of comparable property, the determination is not limited to that consideration and other substantial facts and circumstances may have probative value. *United States* v. *45,131.44 Acres of Land,* 483 F.2d 569 (10th Cir. 1973); *United States* v. *Sowards, supra; United States* v. *25.02 Acres of Land, supra.*

During Taylor's testimony before the commission regarding the prior disruptive effects missle overflights had on his ranch operation, he referred to the sum of $28,000 paid to him by the United States for the earlier encumbrance. The United States contends this was prejudicial because, according to the calculations of the United States, one arrives at the commission's award of $33,735.00 by adjusting $28,000 for a longer term plus inflation.

This argument is utterly without merit. *Nowhere* in the commission's findings with respect to award calculations can we find any mention of $28,000.00, much less any extrapolations to $28,000 for inflation or longer lease terms.

The commission detailed the process it used to arrive at Taylor's award and in fact relied on a comparable found in a chart of comparables offered by the Government in its Exhibit 4. The commission found "that the figure $5.33 price per animal unit month listed in comparable 1 U is the closest reasonable figure for unencumbered comparables except that it should be adjusted downward to $5.00 per animal unit due to the different period of time and lease term" [R., Vol. 1, p. 66]. The commission proceeded to adjust the unencumbered monthly rental using Crowder's 50% discount to arrive at $2.50 per animal unit month as the fair rental value at the time of the taking.

Commissioners must, of necessity, consider all relevant evidence in the process of creating a record from which we can extract findings which must be supported by substance rather than conclusion. *United States* v. *Merz*, 376 U.S. 192 (1964); *Caporal* v. *United States*, 577 F.2d 113 (10th Cir. 1978). The admitted prior agreement price was clearly irrelevant to the path followed by the commission. It was disregarded by the commission as comparable evidence. Thus, the Taylor testimony relative to payment to him under a prior evacuation agreement of $28,000 was not clearly erroneous. *United States* v. *Corbin*, 423 F.2d 821 (10th Cir. 1970). The report does not demonstrate commission reliance on the $28,000 payment. We find no indication in the report that it was considered as an element upon which the award was based. Accordingly, we affirm the award to the Taylors.

II.

The United States contends that there was insufficient evidence to support any award to the State.

The test of whether the trial court has committed reversible error in adopting the award of a commission is whether the award is clearly erroneous, based upon misapplication of law, unsupported by the evidence or contrary to the clear weight of the evidence. *United States* v. *79.98 Acres of Land*, 459 F.2d 185 (10th Cir. 1972). For the reasons set forth below we find the trial court's adoption of the commission award to be clearly erroneous and unsupported by the evidence.

In finding a 25 cent per acre diminution in fair rental value for the State's reserved interests in the leased land, the commission declared that "an examination of New Mexico's Exhibit Z and Mr. McTeigue's testimony" [R., Vol. I, p. 66] supported its conclusion. Exhibit Z was admitted *only* to show the "entire project area and Taylor ranch in juxtaposition to that area." [R., Vol. III, p. 124]. The Government did not object to the exhibit's use for that purpose. However, the commission did not limit the exhibit's use to that purpose; and instead, it was used as a basis to support the commission's conclusion that

tracts of state land had a remaining highest and best use for granting easements. The commission's reliance on Exhibit Z as support for this conclusion was clearly erroneous.

The commission then directed the District Court to determine the actual acreage involved in the tracts purportedly designated as having a remaining highest and best use. The Court subsequently found 16,945.99 acres to be taken after requesting the parties to resolve the acreage question by stipulation. After careful review of Exhibit Z, we conclude that only some 1600 acres could have been considered by the commission as having clear potential for easements. Even that conclusion is guesswork. There exists a discrepancy of over 15,000 acres between the stipulated acreage and the three tracts designated by the commission. Accordingly, there is no competent evidence in support of the award to the State.

A landowner is entitled to have the market value of his property determined by reference to the highest and best use for which it is available. *United States* v. *91.80 Acres of Land*, 586 F.2d 79 (5th Cir. 1978), *cert. denied*, 441 U.S. 944 (1979). Ordinarily the highest and best use for property condemned is the use to which it is subjected at the time of the taking. However, the courts recognize that there may be circumstances that require a finding that another highest and best use exists. *United States* v. *Buhler*, 305 F.2d 319 (5th Cir. 1962).

The State claims that the land leased to the Taylors for grazing had a remaining highest and best use for the granting of easements. The standard applicable to determine whether the owner has demonstrated an alternative highest and best use is whether there is a reasonable probability that the land is physically adaptable for such use and whether there is a need or demand for such use in the reasonably near future. *Olson* v. *United States*, 992 U.S. 248 (1934); *United States* v. *341.45 Acres of Land*, 633 F.2d 108 (8th Cir. 1980). The State's expert witness, McTeigue, could not recollect any requests for use of these State reserved interests on the Taylor ranch which were denied because of the Government's taking. Furthermore, McTeigue could not demonstrate any future requests for the easements. The plat, Exhibit Z, which the commission

based part of its conclusion on, was offered only to show the relationship between State-leased land and Taylor's fee land. It was simply insufficient to demonstrate a reasonably probable future use for easements.

It is established that not every deprivation of use, possession or control is a taking. *Sun Oil* v. *United States,* 572 F.2d 786 (Ct. Cl. 1978); *Pinks* v. *United States,* 395 P.2d 999, *cert. denied,* 393 U.S. 960 (1968). The burden rests on the Owner to establish by competent evidence the compensation to which he is due. *United States* v. *494.10 Acres of Land, supra; Sowards, supra.*

We must conclude following our review of the record that the State failed to meet its burden of establishing with reasonable probability that an alternative highest and best use existed. Accordingly, we must reverse the award rendered on behalf of the State in that it was clearly erroneous and unsupported by the evidence.

We affirm in part and reverse in part.

APPENDIX D

SEPTEMBER TERM—October 7, 1981

Before Honorable William J. Holloway, Jr.,
Honorable James E. Barrett and
Honorable William E. Doyle, Circuit Judges.

Nos. 79-2270
79-2087
(Consolidated)
(D.C. Nos. 9746 & 10030)

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

vs.

77,819.10 Acres of Land, more or less, situate in Socorro and Catron Counties, New Mexico; JAY TAYLOR a/k/a Jay L. Taylor and IMOGENE H. TAYLOR a/k/a Imogene Herring Taylor, his wife, the FEDERAL LAND BANK OF WICHITA, THE STATE OF NEW MEXICO BY COMMISSIONER OF PUBLIC LANDS; COUNTY TREASURER OF SOCORRO COUNTY, COUNTY TREASURER OF CATRON COUNTY and UNKNOWN OWNERS,
Defendants-Appellees.

The Court, *sua sponte*, in the interest of justice, vacates the order entered in the captioned causes on August 10, 1981, denying the petition of appellees to recall the opinion and set aside the opinion.

The Court, on its own motion orders:

1. The mandate issued to the United States District Court on May 12, 1981 is recalled.

2. The judgent entered herein on April 8, 1981 is vacated.

3. The petition for rehearing is denied.

4. A new judgment is entered this date in accordance with the Court's opinion filed April 8, 1981.

5. The mandate shall issue on October 16, 1981.

HOWARD K. PHILLIPS, Clerk

APPENDIX E

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

Civil Nos. 9746 and 10,030
(consolidated)

UNITED STATES OF AMERICA,

Plaintiff,

vs.

77,819.10 Acres of Land, more or less, situate in Socorro and Catron Counties, New Mexico; Jay Taylor a/k/a Jay L. Taylor and Imogene H. Taylor a/k/a Imogene Herring Taylor, his wife; the Federal Land Bank of Wichita, et al.,

Defendants.

JUDGMENT

THIS MATTER having come before the Court, the Court having reviewed the file herein and being otherwise fully advised in the premises, FINDS:

1. That the Plaintiff, United States of America, by Complaint and Declaration of Taking filed in Civil No. 9746 was vested with an evacuation and entry easement over and on the property of the Defendants, as more specifically described in the Declaration of Taking, for the period September 1, 1972 through March 31, 1973.

2. That the Plaintiff, United States of America, by Complaint and Declaration of Taking filed in Civil No. 10,030 was vested with an evacuation and entry easement over and on the property of the Defendants, as more fully described in the Declaration of Taking, for the period April 1, 1973 to September 30, 1973.

3. That the Commissioners appointed by the Court for purposes of determining just compensation for said taking have ruled that fair and just compensation is $33,735.00 for said taking of the property of Defendants Jay Taylor, a/k/a Jay L. Taylor and Imogene H. Taylor, a/k/a Imogene Herring Taylor, his wife, and that value determination having been affirmed by the Court of Appeals.

4. That the Plaintiff, United States of America, by Complaint and Declaration of Taking filed in Civil No. 9746 was vested with an evacuation of entry easement over and on the property of the Defendant, State of New Mexico, as more fully described in the Declaration of Taking, for the period September 1, 1972 through March 31, 1973.

5. That the Plaintiff, United States of America, by Complaint and Declaration of Taking filed in Civil No. 10,030 was vested with an evacuation and entry easement over and on the property of the Defendant, State of New Mexico, as more fully described in the Declaration of Taking, for the period April 1, 1973 through September 30, 1973.

6. That the Commissioners' Report found value of the State's reserved interests in State leased grazing land acquired by Plaintiff was S-25 an acre, but that value determination having been reversed by the Court of Appeals.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED as follows:

1. That the Commissioners' Report filed herein on February 12, 1979, be and the same hereby is affirmed by this Court as to Defendants Jay Taylor a/k/a Jay L. Taylor and Imogene H. Taylor, a/k/a Imogene Herring Taylor, his wife.

2. That Defendant Jay Taylor, a/k/a Jay L. Taylor and Imogene H. Taylor a/k/a Imogene Herring Taylor, his wife, do have and recover judgment against Plaintiff in the amount of $33,735.00, plus interest at the rate of 6% per annum on $16,867.50 from September 1, 1972, the date of the first taking

of seven months in Civil No. 9746 and on $16,867.50 from April 1, 1973, the date of the second six month taking in Civil No. 10,030, until paid.

3. That the award to the Defendant State of New Mexico is reversed.

_____

UNITED STATES DISTRICT JUDGE

APPROVED:

R.E. THOMPSON
United States Attorney

By_____
RAYMOND HAMILTON,
Asst. U.S. Atty.

RODEY. DICKASON, SLOAN, AKIN & ROBB, P.A.

By_____
ROBERT D. TAICHERT
Attorney for Defendants Taylor

STATE OF NEW MEXICO,
Commissioner of Public Lands

By_____
WILLIAM O. JORDAN
General Counsel

APPENDIX F

Section 19-7-57 NMSA, 1978 Comp.

The commissioner may grant rights-of-way and easements over, upon or across state lands for public highways, railroads, tramways, telegraph, telephone and power lines, irrigation works, mining, logging and for other purposes, upon payment by the grantee or grantees of the price fixed by the commissioner, which shall not be less than the minimum price for the lands, used, as fixed by law.

APPENDIX G

Section 19-7-29 NMBA, 1978 Comp.

In all Issues of state lands for grazing or agricultural purposes there shall be inserted a clause reserving the right to execute leases for mining purposes thereon, or for the extraction of petroleum, natural gas, salt or other deposit therefrom, and the right to sell or dispose of any other natural surface products of such lands other than grazing, agricultural or horticultural products; also a clause reserving the right to grant rights-of-way and easements for any of the purposes mentioned in Section 19-7-57 NMSA 1978.

APPENDIX H

THE ARIZONA-NEW MEXICO ENABLING ACT, 36 Stat. 557 (1910)

It is hereby declared that all lands hereby granted, including those which, having been heretofore granted to the said territory, are hereby expressly transferred and confirmed to the said state, shall be by the said state held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.

Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than that for which such particular lands, or the lands from which such money or thing of value shall have been derived, were granted or of trust; provided, however, that the state of New Mexico, through proper legislation, may provide for the payment, out of the income from the lands herein granted, which land may be included in a drainage district, of such assessments as have been duly and regularly established against any such lands in properly organized drainage districts under the general drainage laws of said state.

No mortgage or other encumbrance of said lands, or any thereof, shall be valid in favor of any person or for any purpose or under any circumstances whatsoever. Said lands shall not be sold or leassd, in whole or in part, except to the highest and best bidder at a public auction to be held at the county seat of a county wherein the lands to be affected, or the major portion thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time and place of the transaction to be had, with a full description of the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the state capital, and in that newspaper of like circulation which shall then be

regularly published nearest to the location of such lands so offered; nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place, in the manner and after the notice by publication thus provided for sales and leases of the lands themselves; provided, that nothing herein contained shall prevent said proposed state from Leasing any of said lands referred to in this section for a term of five years or less without said advertisement herein required.

All lands, leaseholds, timber and other products of land before being offered shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained, nor in any case less than the minimum price hereinafter fixed, nor upon credit unless accompanied by ample security, and the legal title shall not be deemed to have passed until the consideration shall have been paid.

Lands east of the line between ranges eighteen and nineteen east of the New Mexico principal meridian shall not be sold for less than five dollars [($5.00)] per acre, and lands west of said line shall not be sold for less than three dollars [($3.00)] per acre, and no lands which are or shall be susceptible of irrigation under any projects now or hereafter completed or adopted by the United States under legislation for the reclamation of lands, or under any other project for the reclamation of lands, shall be sold at less than twenty-five dollars [($25.00)] per acre; provided, that said state, at the request of the secretary of the interior, shall from time to time relinquish such of its lands to the United States as at any time are needed for irrigation works in connection with any such government project. And other lands in lieu thereof are hereby granted to said state, to be selected from lands of the character named and in the manner prescribed in Section Eleven of this act.

There is hereby reserved to the United States and exempted from the operation of any and all grants made or confirmed by this act to said proposed state all land actually or

prospectively valuable for the development of water powers or power for hydroelectric use or transmission and which shall be ascertained and designated by the secretary of the interior within five years after the proclamation of the president declaring the admission of the state; and no lands so reserved and excepted shall be subject to any disposition whatsoever by said state, and any conveyance or transfer of such land by said state or any officer thereof shall be absolutely null and void within the period above named; and in lieu of the land so reserved to the United States and excepted from the operation of any of said grants, there [shall] be, and is hereby, granted to the proposed state an equal quantity of land to be selected from land of the character named and in the manner prescribed in Section Eleven of this act.

Every sale, lease, conveyance or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this act shall be null and void, any provision of the constitution or laws of the said state to the contrary notwithstanding.

It shall be the duty of the attorney general of the United States to prosecute in the name of the United States and its courts such proceedings at law or in equity as may from time to time be necessary and appropriate to enforce the provisions hereof relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom.

Nothing herein contained shall be taken as in limitation of the power of the state or of any citizen thereof to enforce the provisions of this act; provided, that the secretary of the interior is hereby authorized in his discretion to accept on behalf of the United States, title to any land within the exterior boundaries of the national forests in the state of New Mexico, title to which is in the state of New Mexico, which the said state of New Mexico is willing to convey to the United States, and which shall be so conveyed by deed duly recorded and executed by the governor of said state and the state land commissioner, with the approval of the state land board of said state, and as to land granted to

the said state of New Mexico for the support of common schools with the approval of the state superintendent of public instruction of said state, as to institutional grant lands with the approval of the governing body of the institution for whose benefit the lands so reconveyed were granted to said state, if, in the opinion of the secretary of agriculture, public interests will be benefited thereby and the lands are chiefly valuable for national forest purposes, and in exchange therefor, the secretary of the interior, in his discretion, may give not to exceed an equal value of unappropriated, ungranted, national forest or other government land belonging to the United States within the said state of New Mexico, as may be determined by the secretary of agriculture and be acceptable to the state as a fair compensation, consideration being given to any reservation which either the state or the United States may make of timber, mineral or easements.

Opposition

Supreme Court, U.S.
FILED
MAR 23 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1256

In the Supreme Court of the United States

OCTOBER TERM, 1981

NEW MEXICO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

EDWARD J. SHAWAKER
DAVID C. SHILTON
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether, where the United States condemned a 13-month estate requiring the occasional evacuation of persons from parcels of State trust lands acquired pursuant to the New Mexico-Arizona Enabling Act and leased to private parties for grazing purposes, the United States must compensate the State for rights reserved under the leases even though the State failed to show that its reserved rights had any value that was affected by the taking and the United States had compensated the State's lessee for the diminution in value of the leasehold estate.

TALBE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 3

Conclusion 7

Appendix 1a

TABLE OF AUTHORITIES

Cases:

Alamo Land & Cattle Co. v. *Arizona*, 424 U.S. 295, rev'g 495 F. 2d 12 ..... 4, 5, 6

Nebraska v. *United States*, 164 F. 2d 866, cert. denied, 334 U.S. 815 5

Olson v. *United States*, 292 U.S. 246 5

State v. *Lassen*, 99 Ariz. 161, 407 P.2d 747, rev'd, 385 U.S. 458 ..... 3, 4, 5, 6

United States v. *New Mexico*, 536 F. 2d 1324 6

United States v. *78.61 Acres of Land*, 265 F. Supp. 564 6

United States v. *341.45 Acres of Land*, 633 F. 2d 108 5

Statute:

Act of June 20, 1910, ch. 310, 36 Stat. 557 (New Mexico-Arizona Enabling Act) 2, 4, 5

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1256

NEW MEXICO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 6a-15a) is reported at 647 F. 2d 104. The unreported memorandum opinion of the district court is attached hereto (App., *infra*, 1a-4a), as is the unreported opinion of the condemnation commission (App., *infra*, 6a-17a).

JURISDICTION

The judgment of the court of appeals (Pet. App. 16a) was entered on October 7, 1981. The petition for a writ of certiorari was filed on January 5, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States filed complaints in 1972 and 1973 taking evacuation estates lasting 13 months and affecting 77,810.10 acres of land near the White Sands Missile Range

in New Mexico. The estates were taken in connection with the Athena-H Missile project. The United States acquired the right to require occupants to vacate the land for up to 12 hours when test firings were conducted. The United States also acquired the right to enter the land to notify occupants that they must leave, to search for fallen projectiles, to investigate damage claims, and to erect signs. The land was all part of a single cattle ranch operated by the Taylor family. The Taylors owned about 80% of the land involved and leased grazing rights on the rest from the State of New Mexico, which had acquired the land by grant from the United States under the Act of June 20, 1910, ch. 310, 36 Stat. 557 (New Mexico-Arizona Enabling Act). In leasing the grazing rights, the State reserved all other interests in the land, including the right to grant easements for hunting, fishing, water wells, signs, and rights of way (Pet. App. 7a).

The question of just compensation was tried before a commission. The commission found the highest and best use of the Taylor ranch to be for grazing and ranching. It also found that some of the State-owned tracts had a remaining highest and best use for water wells, water easements, and easements of access (App., *infra*, 14a-15a). The commission awarded the Taylors $33,735—the difference between the fair rental value of the affected area before and after the taking (*id.* at 17a). The commission found that those parts of the State's land having a remaining highest and best use for granting easements had been reduced in value by 25 cents per acre but that the value of the rest of the State's property had not been affected (*id.* at 14a-15a). The Commission awarded the State $4,237.25. The district court entered judgment based upon the commission's report.

The United States appealed both awards. The court of appeals affirmed the award to the Taylors (Pet. App. 10a-13a) but reversed the award to the State (*id.* at 13a-15a). The

court held that no competent evidence supported the commission's finding that some of the State's land had a remaining highest and best use for the granting of easements (*id.* at 14a-15a). The court noted the State's failure to offer competent evidence showing that the land was physically adaptable for such use or that there was a reasonable probability of any demand for such use in the near future (*ibid.*).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review by this Court is not warranted.

The estate taken by the United States lasted 13 months. During that entire period, the lands belonging to the State were leased to the Taylors for grazing purposes. The United States compensated the Taylors fully for the diminution of the fair market rental value caused by its taking. While the State reserved certain interests in the land, the court of appeals found (Pet. App. 14a-15a) that the State had failed to show that the value of those interests was affected by the taking. Petitioners do not dispute the court's conclusion that there was no evidence to support the State's claim that the land had an alternative highest and best use for granting various easements. Petitioners nevertheless assert (Pet. 5-10) that the United States must compensate the State because it retained the legal right to grant such easements. Relying upon *Lassen* v. *Arizona Highway Department* 385 U.S. 458 (1967), petitioners maintain (Pet. 5-10) that the usual rules of federal condemnation do not apply and that the State is entitled to compensation even though there was no evidence that its land was physically adapted to the exercise of the reserved rights or that there was any demand for their use.

Lassen will not support such a radical result. *Lassen* concerned the acquisition by the State of Arizona of highway rights-of-way across federally-donated lands held by the State in trust pursuant to the provisions of the New Mexico-Arizona Enabling Act. The Supreme Court of Arizona held that the State Highway Department was not obligated to compensate the trust for taking those rights-of-way because it could be conclusively presumed that the highways enhanced the value of the land by an amount at least equal to the value of the property taken. *State* v. *Lassen*, 99 Ariz. 161, 407 P.2d 747 (1965). This Court reversed, holding that the terms of the New Mexico-Arizona Enabling Act did not permit Arizona to diminish the compensation payable to the trust by the amount of any enhancement in the value of the remaining trust lands (385 U.S. at 468-470). Permitting Arizona to acquire rights-of-way free of charge, the Court concluded, would not have fulfilled Congress' intent that the grants of land provide substantial support for the public schools that were the beneficiaries of the trust (*id.* at 467). But *Lassen* did not hold that such a trust was entitled to compensation for rights not shown to have been affected by a taking or for rights of no proven value. Nor did *Lassen* hold that the rules usually applicable in federal condemnation proceedings are inapplicable when lands held in trust under the New Mexico-Arizona Enabling Act are involved.

Petitioners' contention (Pet. 7-8) that the usual rules of federal condemnation do not govern in cases involving such trust lands was rejected in *Alamo Land & Cattle Co.* v. *Arizona*, 424 U.S. 295 (1976). There, Arizona had executed a 10-year grazing lease on lands held in trust under the New Mexico-Arizona Enabling Act. During the term of the lease, the United States condemned permanent flowage easements for a flood control project. The parties stipulated the total amount of the award, but the State and the lessee

disagreed over whether the lessee was entitled to compensation. Relying on *Lassen*, the court of appeals held that Arizona was entitled to the entire award. *United States* v. *2,562.92 Acres of Land*, 495 F. 2d 12, 14 (9th Cir. 1974). However, this Court reversed, holding that nothing in the New Mexico-Arizona Enabling Act prevented application of the normal rule in federal condemnation cases that the lessee and not the lessor is entitled to compensation for the value of an unexpired leasehold interest taken by the United States (424 U.S. at 303-304).

Alamo Land & Cattle Co. makes it clear that the State is not automatically entitled to compensation in the present case. Where, as here, the United States condemns an estate that does not affect the value of the State's reserved interest, it is consistent with *Alamo Land & Cattle Co.* to pay all of the compensation to the lessee and none to the State. See also *Nebraska* v. *United States*, 164 F. 2d 866, 868-869 (8th Cir. 1947), cert. denied, 334 U.S. 815 (1948).[1]

The situation might have been different if the State had shown that its land could have been used for something other than grazing and that the taking prevented the State from exploiting that alternative use. Here, however, the State failed to prove either that the land was physically adaptable for the asserted alternative use of granting easements or that there was any need or demand for such use in the reasonably near future (Pet. App. 13a-15a). See *Olson* v. *United States*, 292 U.S. 246, 255-257 (1934); *United States* v. *341.45 Acres of Land*, 633 F. 2d 108, 111 (8th Cir. 1980). The only evidence tendered to show the existence of such an alternative use was a map of the Taylor ranch

---

[1]The other cases cited by petitioner (Pet. 5), unlike *Alamo Land & Cattle Co.* and the present case, do not involve the condemnation by the United States of trust land under lease to a third party.

depicting the location of the State-owned parcels (Pet. App. 13a-14a; App., *infra*, 13a-15a). As the court of appeals held (Pet. App. 13a-14a), that map was insufficient to establish that anything of value had been taken from the State.

The position advanced by petitioners would lead to absurd and unjust results. Petitioners argue in essence that the State must be compensated whenever it holds any legal interest in land that is the subject of a taking whether or not the State's interest is actually affected or has any legal value. If the United States must compensate New Mexico for its bare legal right to grant easements, it might also have to pay for the mineral rights reserved by the State in its grants in fee to Taylor (see Tr. 102-103), whether or not those rights had any value or were affected by the taking. This sort of automatic recovery would obviously be unfair to the United States; it would grant the State an undeserved windfall; and it would make the carrying out of public projects unnecessarily expensive.[2]

---

[2]In its brief as amicus curiae, South Dakota argues that the decision below conflicts with *Lassen* by sanctioning a taking of trust land without compensation. However, South Dakota simply assumes (Br. 7-8) that something of value was taken from New Mexico and overlooks both the fact that the trust land was under lease for the entire period of the taking and that New Mexico failed to show that its reserved rights were affected. South Dakota also overlooks *Alamo Cattle & Land Co.* and relies upon cases that do not consider trust land under lease. See, *e.g., United States* v. *78.61 Acres of Land*, 265 F. Supp. 564 (D. Neb. 1967); *United States* v. *New Mexico*, 536 F. 2d 1324 (10th Cir. 1976).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

EDWARD J. SHAWAKER
DAVID C. SHILTON
Attorneys

MARCH 1982

DOJ-1982-03

Appendix

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

PLAINTIFF,

VS.

77,819.10 ACRES OF LAND, MORE OR LESS, SITUATE IN SOCORRO AND CATRON COUNTIES, NEW MEXICO; JAY TAYLOR a/k/a JAY L. TAYLOR AND IMOGENE H. TAYLOR a/k/a IMOGENE HERRING TAYLOR, HIS WIFE; THE FEDERAL LAND BANK OF WICHITA, ET AL.,

DEFENDANTS.

FILED
UNITED STATES DISTRICT COURT
ALBUQUERQUE, NEW MEXICO
JUL 11 1979

CIV NOS. 9746 and 10030
(Consolidated)

ENTERED ON DOCKET
7-11-79

MEMORANDUM OPINION

This matter comes on for consideration upon the plaintiff's Objections to Commissioners' Report, which report was filed with the Court following a full hearing before the Commission to determine what compensation is due the defendants as a result of these condemnation actions. The Court has considered the memorandum filed, together with the record of the hearing and the entire file in this cause and concludes that the objections must be overruled.

The plaintiff has raised four separate objections to the findings made by the Commission with regard to compensation due the defendant State of New Mexico, represented by the Commissioner of Public Lands. The most basic of them is the plaintiff's contention that the State of New Mexico does not have a compensable interest in any land

subject to the taking. It is undisputed that some of the land outlined in the Declaration of Taking is indeed state land, and is leased to the defendant Taylor for grazing pruposes. However, the State argues that it has reserved a separate interest in the land, apart from its use for grazing purposes, which includes the authority to issue rights-of-way and easements upon the land, to develop minerals, hunt game and wildlife and the like. It is these reserved rights which the State seeks compensation for, and which plaintiff denies exist.

In *Lea County Water Co.* v. *Reeves*, 43 N.M. 221 (1939), the New Mexico Supreme Court found that even where there is no express reservation of rights in a grazing lease, the State retained those rights enumerated as reserved in state statutes, including those claimed by the Commissioner of Public Lands in this action. *See* Sections 19-7-28 and 19-7-57, *N.M. Stat. Ann.* (1978). Once the plaintiff in this action named the State as a defendant it condemned this separate, reserved interest of the State. At that point, the State did not have an interest to protect from trespass or other interference by a Federal Tort Claims Act or Tucker Act suit. Its interest was taken by the plaintiff, and compensation must be paid for that taking.

This finding is of course separate from any finding the Commission itself made concerning actual damage due to the taking. In reviewing the record it is obvious that the Commission made its findings with regard to the State dependent upon a ruling by this Court on the question of a compensable interest. Having found such an interest, the Court further finds that plaintiff's other objections with regard to compensation owed the State for the taking are without merit.

The objection to the Commission finding that "each acre was under lease for grazing purposes for $32 per acre" is not well taken. While it is true that the actual rental is in fact 35

cents an acre, the record is clear that the fair rental *value* was $32 per acre and that this is what concerned the Commission. It appears that there is sufficient evidence to support the findings of the Commission concerning highest and best use of the State land and the 25 cent per acre reduction in value figure. Therefore, the objections of the plaintiff on these points are overruled.

With regard to the Commission's findings of compensation due the defendant Taylor, the objections of the plaintiff are many. First the plaintiff argues that testimony concerning an earlier Athena-type project and the compensation agreement reached between the defendant Taylor and the government was improper in that compensation paid by a condemnor in similar situations is not proper evidence of market value. The Court finds that the rationale for the introduction of this evidence and the apparent use made of it by the Commission was not to prove value, but to establish the factual background and history of the effects of this type of condemnation upon the Taylor ranch, which is information a purchaser would have before buying. Thus, the Court concludes that the evidence was properly admitted.

The plaintiff also objects to the Commission's findings concerning the value of the defendant Taylor's interest. It is clear from the record that the Commission had the benefit of several expert opinions, appraisal approaches and valuations, and chose what it found to be the most accurate and credible evidence. Having reviewed the entire record the Court cannot say that the Commission's findings are clearly erroneous, and thus will overrule the plaintiff's several objections on this issue.

This leaves only the claim of the plaintiff that the testimony of the witness Crowder was incompetent evidence. The Commission was well aware of the witness' non-expert status, recognized that in its report, and acknowledged in

the record that the qualifications of the witness would be considered by it in weighing the credibility and accuracy of the testimony given. The Court is satisfied that the introduction of the testimony and its evaluation by the Commission was proper, and therefore will overrule the plaintiff's objection on this point.

In light of this Opinion, and the finding of the Court that the report of the Commission should be upheld, it is hoped that the unresolved question of acreage with regard to the State claim can be resolved by stipulation between the parties. In the event that such is not settled within 30 days of this date, the matter will be set down for hearing before the Court.

An Order will be entered overruling the plaintiff's objections and affirming the report of the Commission in accordance with this Opinion.

/s/ Howard Bratton

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

PLAINTIFF,

VS.

77,819.10 ACRES OF LAND, MORE OR LESS, SITUATE IN SOCORRO AND CATRON COUNTIES, NEW MEXICO; JAY TAYLOR a/k/a JAY L. TAYLOR AND IMOGENE H. TAYLOR a/k/a IMOGENE HERRING TAYLOR, HIS WIFE; THE FEDERAL LAND BANK OF WICHITA, ET AL.,

DEFENDANTS.

FILED
UNITED STATES DISTRICT COURT
ALBUQUERQUE, NEW MEXICO
JUL 11 1979

CIV NOS. 9746 and 10030
(Consolidated)

ENTERED ON DOCKET
7-11-79

ORDER

This matter having come on for consideration upon the Objections to Commissioners' Report filed by the plaintiff, and the Court having filed its Memorandum Opinion herein concluding that the objections are not well taken and should be overruled; Now, Therefore,

IT IS BY THE COURT ORDERED that the Objections to Commissioners' Report filed by the plaintiff are overruled.

/s/ Howard Bratton

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

RECEIVED
FEB 01 1979
US ATTORNEY'S OFFICE
ALBUQUERQUE, N.M.

UNITED STATES OF AMERICA,

PLAINTIFF,

vs.

77,819.10 ACRES OF LAND, MORE OR LESS, SITUATE IN SOCORRO AND CATRON COUNTIES, NEW MEXICO, AND JAY TAYLOR, ET AL.

DEFENDANTS.

Civil Nos. 9746 and 10030

COMMISSIONERS' REPORT

TO: The Honorable Howard C. Bratton
The United States District Judge
District of New Mexico

1. HEARING: Pursuant to Amended Notice given, hearing was held by your Commissioner on Wednesday, November 29, 1978, at the United States Courthouse, Las Cruces, New Mexico.

2. IDENTIFICATION OF PARTIES AND COUNSEL: The Defendants having an interest in the tracts involved in this hearing:

Parcel 1: Jay Taylor, a/k/a J. L. Taylor and Imogene H. Taylor, a/k/a Imogene Herring Taylor, his wife, the above named Defendants were represented at the hearing by Rodney, Dickinson, Sloan, Akin and Robb, P. A. through William G. Briggs, Esq. The United States was represented by James B. Grant, Esq., Assistant U. S. Attorney. To the extent mineral interests were reserved by the State of New Mexico, the Commissioner of Public Lands of the State of New Mexico was represented by its attorney, William O. Jordan.

Parcel 2: The State of New Mexico by Commissioner of Public Lands was represented by its attorney hereinabove named. Defendants Taylor were represented by their counsel hereinabove named. The United States was represented through its Assistant U.S. Attorney hereinabove named.

3. DESCRIPTION OF TRACT TAKEN: The legal description of the tract taken is as follows:

Parcel 1:

A. Township 1 South, Range 7 West of the New Mexico Principal Meridian, Socorro County, New Mexico:

All of Section 1, 2, 3, 4, 5, 8 and the North Half of Section 9, containing an area of 4,641.92 acres, more or less.

B [*sic*] B. Township 1 South, Range 8 West, N.M.P.M.

Socorro County, New Mexico:

Lot No. 3 of Section 6 and the SE 1/4, SW 1/4 of Section 10, containing an area of 72.79 acres, more or less.

C. Township 1 South, Range 9 West, N.M.P.M.

Catron County, New Mexico:

Lots 5, 6, 7 and 8 of Section 1

D. Township 1 North, Range 7 West, N.M.P.M.

Socorro County, New Mexico:

All of Sections 6 and 7, the S 1/2 of Section 8, the S 1/2 of Section 15 and all of Sections 16, 17, 18, 19, 20, 21, 22, 26, 27, 28, 29, 30, 31, 32, 33, 34 and 35, containing an area of 12,805.04 acres, more or less.

E. Township 1 North, Range 8 West, N.M.P.M.

Socorro County, New Mexico:

All of Sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 23, 24 and 25, the SE 1/4 NE 1/4 and the NE 1/4 NW 1/4 of Section 28; all of Sections 29, 30, 31 and 35, containing an area of 17,362.08 acres, more or less.

F. Township 1 North, Range 9 West, N.M.P.M.

Catron County, New Mexico:

All of Sections 1, 2 and 3, the E 1/2 and E 1/2 SW 1/4 of Section 9, all of Sections 10, 11, 12, 13, 14, 15 and 16, the E 1/2 NE 1/4 and the NE 1/4 SE 1/4 of Section 17, the N 1/2 N 1/2 of Section 22, all of Sections 23, 24, 25 and 26, the E 1/2 NE 1/4 and the NE 1/4 SE 1/4 of Section 27, the NE 1/4 of Section 35, the N 1/2 and the SE 1/4 of Section 36, containing an area of 10,405.68 acres, more or less.

G. Township 2 North, Range 7 West, N.M.P.M.

All of Section 31, containing an area of 641.76 acres, more or less.

H. Township 2 North, Range 8 West, N.M.P.M.

Socorro County, New Mexico:

Lots 3 and 4 of Section 19, the S 1/2 of Sections 19, 20, 21, 22 and 23, all of Sections 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35 and 36, containing an area of 9,267.66 acres, more or less.

I. Township 2 North, Range 9 West, N.M.P.M.

Catron County, New Mexico:

The S 1/2 of Section 24, all of Section 25, the E 1/2, SE 1/4 and the SW 1/4, SE 1/4 of Section 34 and all of

Sections 35 and 36, containing an area of 2,360.00 acres, more or less.

Parcel 2:

A. Township 1 South, Range 9 West, N.M.P.M.

Catron County, New Mexico:

Lots 1, 2, 3, 4, 9, 10, 11 and 12 of Section 1.

B. Township 1 South, Range 7 West, N.M.P.M.

Socorro County, New Mexico:

All of Sections 6 and 7, containing an area of 1,264.07 acres, more or less.

C. Township 1 South, Range 8 West, N.M.P.M.

Socorro County, New Mexico:

All of Sections 1, 2, 3, 4, and 5, Lots No. 1, 2 and 4 through 14, the E 1/2, SW 1/4 and the SE 1/4 of Section 6, all of Sections 7, 8 and 9, the N 1/2, N 1/2, S 1/2, S 1/2, SE 1/4 and the SW 1/4, SW 1/4 of Section 10, all of Sections 11, 12, 13, 14, 15, 16, 17, and 18, Lots 1, 2 and the E 1/4, NW 1/4 and the NE 1/4 of Section 19, the N 1/2 of Section 20, and the NW 1/4 of Section 21, containing an area of 12,864.88 acres, more or less.

D. Township 1 North, Range 8 West, N.M.P.M.

Socorro County, New Mexico:

All of Sections 21, 22, 26 and 27, the S 1/2, S 1/2, N 1/2, NE 1/4, NE 1/4 and the NW 1/4, NW 1/4 of Section 28, all of Sections 32, 33, 34 and 36, containing an area of 5,680.00 acres, more or less.

Parcels 1 and 2 contain 77,819.10 acres, more or less.

4. DATE OF TAKING: The date of taking is the first day of September, 1972, for a six-month period, in Civil

Action 9746 and the first day of April, 1973, for an additional six-month period, in Civil Action 10030. The total time of taking is 13 months.

5. TESTIMONY:

A. The Defendant Taylor called as witnesses:

(1) Mr. Jay Taylor. Mr. Taylor is the owner of H H Ranch containing approximately 200 sections in this State. Mr. Taylor resides in Amarillo, Texas, and is a rancher. Mr. Taylor is the president or past-president of various cattle and agricultural industry associations, and a past member of the Federal Reserve Board. Mr. Taylor testified in 1972-73 that he had approximately 200 miles of fence on the H H Ranch, being the entire perimeter plus some interior fencing. In addition, he had approximately 150 miles of pipeline buried underground, primarily for cattle watering. Several cattle tanks were equipped with water warmers. In addition, two or three irrigation wells were utilized for cultivation purposes with approximately 160 acres of land under cultivation.

During a taking involving conditions similar to the estate to be acquired herein, Mr. Taylor testified (over the objection by the United States on the basis of lack of materiality and relevancy) that problems caused by the use by the Government included damage to property caused by boosters and other metal debris hitting the ground, helicopters scaring cattle, loss of weight to the cattle, calves becoming lost from their mothers and becoming "dogies" and mother cows becoming "tight-bag cows". A "dogie" was described by Mr. Taylor to result in a stunned animal due to having to forage for himself. The "tight-bagged" cows were described as being mother of "dogies". As the land owner and as the lessee of three ranches of not less than 100,000 acres, Mr. Taylor advised this Commission that he would not lease or buy any ranch with a taking such as that set forth herein,

given the problems gained through his personal prior experience and his knowledge of ranching operations. Mr. Taylor did testify that the previous over-flight operations involved his entire ranch and not a portion of his ranch as in the instant case. From plats submitted, approximately 2/3 of his ranch is involved in the present taking. It was not established whether the conditions of the prior overflights involved any additional restrictions upon the estate herein acquired than as requested in the Petition. In your Commission's opinion, the information furnished by Mr. Taylor was helpful in arriving at a fair market rental of the property herein as a willing tenant in your Commission's opinion would want to consider the effect upon ranching and grazing operations (the highest and best use of the property) in arriving at an actual rental figure.

(2) Mr. McKinley. Mr. McKinley is the present foreman of the H H Ranch. Mr. McKinley has lived on the ranch since he was a young man in the 1960's and including through 1972-1973. Mr. McKinley testified, over the objection of the United States, that after over-flights in 1962-1968 involving restrictions similar to the estate to be acquired by the government herein, the ranch's cattle would run, causing some loss of weight on the animals, some "dogies" and some "tight-bagged cows". Also, he testified some calves disappeared. The cattle at that time, however, were wild cattle and many horses were kept as part of the ranching operation. The difference between raising wild cattle and the cattle raised in 1972-73 was not presented.

(3) Mr. Charles Crowder. Mr. Crowder is a conservation contractor residing in Santa Teresa, N.M. Mr. Crowder testified that he had brought and sold over two million acres of land, that he has owned and operated numerous ranches in New Mexico and in other states. On these ranches, he has conducted cattle businesses with numerous mother cows

and calves. He testified that he has no experience in appraisals, however, he based his opinion upon the strength of his familiarity with buying and selling real estate. He believed his numerous business dealings and extreme success indicate his personal ability.

He advised this Commission that if he were to lease or purchase a piece of property having an estate acquired by the United States similar to the estate to be acquired in Exhibit D of each Petition, he would want to know what effect such taking would have on the ranching operation prior to leasing. In this respect, past history of similar takings on that particular ranch would be important to him if available. He testified that if he were to lease this ranch with this taking, he would discount the rent he would pay at least 50% for the taking, based upon hearing the testimony of Mr. Taylor as to problems inherent in similar takings.

Mr. Crowder further stated that if he were to purchase the property, he would discount the purchase 20 to 25% with this taking, he would have bought the ranch in 1972 between $20 and $35 per acre.

It was obvious to this Commission from the testimony of the witness that he was not an expert appraiser; however, the Commission determined that from his special experience and skill in the areas of buying, selling and leasing ranches and the management of ranches, he was a "skilled" witness with such specialized knowledge as would assist the Commission to understand the evidence and to assist in determining the facts in issue.

B. The Commissioner of Public Lands called as its witness:

(1) Lincoln N. McTieg of Santa Fe, New Mexico. Mr. McTieg is an appraiser for the New Mexico Land Office. Mr. McTieg testified that the lands owned by the State of New Mexico under Parcel 2 were used solely for grazing. He

further testified that all land sold to Mr. Taylor in Parcel 1 by the Commissioner reserved mineral interests to the Commission. Mr. McTieg testified that notwithstanding grazing leases, the State of New Mexico, through its Commissioner of Public Lands, also issues from time to time hunting and fishing privileges to the New Mexico Game and Fish Department. Water easements, sign easements and easements of access (right of way).

It was unclear to the Commission what approach Mr. McTieg used in determining his estimate of value except that Mr. McTieg indicated that he relied on comparables in determining the value of the land in 1972 and in 1973 for lease purposes for grazing.

Mr. McTieg advised this Commission that a fair annual rental without the encumbrance set forth in the estate to be acquired herein would be $32 per acre. In Mr. McTieg's opinion, the fair annual rental value would be reduced by $1.00 per acre for a minimum devalue total of $19,680 for a twelve-month period. Upon cross examination, Mr. McTieg only had with him one comparable which was not impressive to the Commission. He presented no indication of signing potential nor did he have any potential of game and fish, and he did not have any potential on water well requests and water easement request or on access easement requests.

Through the Commissioner of Public Lands, a plat was tendered as New Mexico Exhibit Z without objection by any party (except the objection of the United States that the exhibit was irrelevant and immaterial due to the fact that the United States contends that the State of New Mexico has no compensable interest herein). The Commission noted in New Mexico Exhibit 3 that the only major contiguous portions of Parcel 2 occurred in Township 1 North, Range 8 West, Township 1 South, Range 9 West, and

Township 1 South, Range 8 West of N.M.P.M. The Commission noted clear potential for right of way easements and water well easements from this plat in this land of the Commissioner.

C. The United States called as its witness:

(1) Tye C. Terrell, Jr., of Santa Fe, New Mexico. Mr. Terrell is a farm and ranch appraiser. He was employed by the Corps of Engineers to appraise the subject property. Mr. Terrell's appraisal was based upon a physical inspection of the H H Ranch. He utilized the fair market rental approach in determining the fair market value of the property. Under this approach, he considered comparable ranches unencumbered and comparable ranches encumbered with this project or similar projects. Based upon the comparables for purportedly unencumbered ranches, Mr. Terrell determined the fair rental value of the property for the 13-month period in question to be $3.35 per animal unit per month. According to his computations, the H H Ranch carried 13,494 animal units for the 13 months for a total fair rental value of $45,204.90.

Using comparables of the ranches purportedly encumbered with the same of [*sic*] similar projects, Mr. Terrell stated that the fair rental value of the property herein would be $3.30 per animal unit month times the 13,494 animal units for the 13 months for a total fair rental value of $44,500. Taking the difference between the two figures. Mr. Terrell testified that under his approach the fair market value after the taking is approximately $700.

6. FINDINGS:

A. In the opinion of the Commission, the highest and best use of the subject tract is for grazing and ranching except for some of the Commissioner of Public Lands properties which has a similar high use for water wells, water easements, easements of access.

B. With respect to the claim of the Commissioner of Public Lands, it is the opinion of this Commission that the fair rental value of all the tracts of the Commissioner's land was not diminished, with the exception of those designated tracts as hereinafter set forth. Each acre was under lease for grazing purposes for $32 per acre. Such purpose was the highest and best use of these tracts. This Commission had insufficient information with respect to comparables offered by the Commissioner of Public Lands to change its opinion and were of the opinion that no damage occurred to the Commissioner of Public Lands on these tracts. It is highly speculative that any of these tracts of land would suffer damage with respect to signing, hunting or fishing, water well, water easement or right-of-way potential, particularly when one views the plat offered by the Commissioner of Public Lands as New Mexico Exhibit Z.

However, with respect to the Commissioner's property in Township 1 North, Range 8 West, in Township 1 South, Range 9 West, and in Township 1 South, Range 8 West, it is the opinion of the Commission that more than one high and best use is available to this land at the same time and was so on the date of taking. This Commission believes the fair rental value of the tracts contained therein would be reduced in value 25 cents per acre for the 13-month period. The Commissioners' opinion is that the $1.00 per acre for the 12-month period is high considering the rental already paid for grazing. Twenty-five cents per acre is more realistic, given the extra potential of these tracts that was encumbered by this taking. An examination of New Mexico Exhibit Z and Mr. McTieg's testimony supports this conclusion. Insufficient information was presented to the Commission to develop the total number of acres within these townships and ranches, and this Commission recommends further proceedings before the District Court to determine the actual acreage.

C. As to the Defendants' Taylor, the Commission concludes the best method of determining the fair market value of the property taken herein is to determine the last fair rental value of the tract to be taken based upon a fair market rental per animal unit approach. It was uncontested that 13,494 animal unit months were involved for the total 13-month period. The Commission was not impressed with the unencumbered comparables selected by the United States as either being remote in time and distant in location or involving different lease term factors. The Commission believes that the figure $5.33 price per animal per unit month listed in comparable 1 U is the closest reasonable figure for unencumbered comparables except that it should be adjusted downward to $5.00 per animal unit due to the different period of time and lease term. The Commission was likewise not impressed with the encumbered lease comparables of the United States for the reason that too many other undisclosed factors would have been considered in each lease. For example, only comparable 2 E involves the Athena H project. As the Athena H project terminated at the end of September 1973, for the Taylor property, Comparable 2 E and the lessee thereunder would undoubtedly have had the Athena H project restrictions only for a three to four month period of the lease. Other leases involve rentals negotiated before the Athena H project was commenced and rental factors vary significantly from year to year. The Commission finds the encumbered fair market rental should have been between $2 and $3 upon their evaluation of the information provided by Mr. Terrell for these encumbered tract, but more precise computations are impossible with the evidence presented.

In the Commission's opinion, the 50% rental discount for an over-flight encumbered property to which was testified by Mr. Crowder is impressive. The Commission finds that a prospective tenant would need to know what effects restrictions similar to the Athena H restrictions would have on a

ranching and grazing operation before entering into an arm's length rental of the ranch. Therefore, the Commission finds that a prospective tenant seeking to rent the subject property or any property under the Athena H restrictions would discount a lease at least 50%. Based upon this finding, it is the Commission's opinion that the unencumbered monthly rental of $5.00 per animal unit month should be reduced to $2.50 per animal unit month immediately after this taking. This figure is consistent with its evaluation of the encumbered monthly rental being between $2.00 and $3.00 per animal unit. When $2.50 per animal unit month is multiplied by the total 13,494 animal unit, the fair rental loss for the total 13-month period is $33,735 as a result of this taking, which this Commission determines to be the said Defendants' loss in value to their property during the period in question.

Respectfully submitted.

COMMISSIONERS

By

_____

John A. Darden, Chairman

Amicus Brief

81-1256

Office - Supreme Court, U.
FILED
FEB 9 1982
ALEXANDER L. STEVAS
CLERK

No. ____

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

STATE OF NEW MEXICO AND ALEX J. ARMIJO,
COMMISSIONER OF PUBLIC LANDS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
TENTH CIRCUIT

BRIEF OF AMICUS CURIAE STATE OF SOUTH DAKOTA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MARK V. MEIERHENRY
ATTORNEY GENERAL
State Capitol
Pierre, South Dakota 57501
Telephone: (605) 773-3215

Counsel of Record

ROXANNE GIEDD
Assistant Attorney General

QUESTION PRESENTED

Whether the Arizona-New Mexico Enabling Act prohibits the United States government from obtaining benefits in the form of easements and rights-of-way reserved upon lands ceded by Congress to the State of New Mexico for specifically enumerated purposes without compensating the State.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
INTEREST OF AMICUS STATE OF SOUTH DAKOTA	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. The trust nature of the lands granted to the western states by their Enabling Acts requires that the United States government compensate the trusts when it condemns trust lands by means of its power of eminent domain.	
II. Several federal courts relying on this Court's previous charaterization of the trusts established by the western states' Enabling Acts have issued decisions which are in conflict with the Tenth Circuit Court of Appeals decision involved herein.	
CONCLUSION	11

TABLE OF AUTHORITIES

CASES	PAGE
Andrus v. Utah, 446 U.S. 500, 100 S.Ct. 1803 (1980)	5
Ervien v. United States, 251 U.S. 41, 47 64 L.Ed. 128, 40 S.Ct. 75, 1919	5
Lassen v. Arizona, 385 U.S. 458, 463, 466 17 L.Ed.2d 515, 87 S.Ct. 584 (1967)	6, 7, 10
United States v. 78.61 Acres of Land in Dawes and Sioux Counties, Nebraska, 265 F. Supp. 564 (D. Neb. 1967)	9
United States v. New Mexico, 536 F.2d 1324 (10th Cir. 1976)	10
OTHER REFERENCES	
Enabling Act of North Dakota, South Dakota, Montana, and Washington, 25 Stat. 676	2
Enabling Act of 1894, 28 Stat. 109	5
Nebraska Enabling Act of 1864, 13 Stat. 47	10
New Mexico-Arizona Enabling Act, 36 Stat. 537, 557	2, 6, 8
Utah's Enabling Act, 100 S.Ct. 1807	5

No. ____

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

STATE OF NEW MEXICO AND ALEX J. ARMIJO,
COMMISSIONER OF PUBLIC LANDS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
TENTH CIRCUIT

BRIEF OF AMICUS CURIAE STATE OF SOUTH DAKOTA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS

STATE OF SOUTH DAKOTA

The State of South Dakota is a public land state, as is the Petitioner State of New Mexico

and the other western states of the United States. The characterization of 'public land states' arises from the very beginnings of the statehood of the western states. The Enabling Acts of the states admitted into the Union of the United States since 1802 included grants of specific sections of federal lands to the states; these lands were to be placed in trust by the states for the use and benefit of designated public activities. The Enabling Act of North Dakota, South Dakota, Montana, and Washington, 25 Stat. 676, granted to the State of South Dakota approximately three million, five hundred thousand acres of land for various purposes, of which approximately two million, eight hundred thousand acres were given to the State for the support of the common schools. Those Enabling Acts which were enacted at later dates, including the New Mexico-Arizona Enabling Act, 36 Stat. 537, at issue herein, ceded specific federal lands to the states for several public purposes in addition to the support of the common schools.

The school land grants created by the Enabling Acts of the western states, have been recognized as establishing trusts held by the states for the benefit of the citizens of the states, regarding the specific purposes of the land grants. As trusts, these land grants are entitled to every protection against violation by both the trustor United States, and trustee western states.

The issue in this appeal is whether the United States government can ignore these trusts established by the various Enabling Acts, and usurp them by condemning, without compensation, the trust lands.

South Dakota's interest in this appeal is in protecting the trust created by its Enabling Act from attack and violation by the United States government.

SUMMARY OF ARGUMENT

The Amicus State of South Dakota submits that the character and inviolate nature of the trust lands established by the Enabling Acts

between the United States and the various western states, demands that the United States Government compensate the trusts when it condemns trust lands under its power of eminent domain. It asserts that the importance of this issue requires that this Petition for Certiorari be granted.

In addition, the Amicus State of South Dakota notes that the Tenth Circuit Court of Appeals decision herein appealed is in conflict with prior decisions rendered by both this Court and other federal courts.

ARGUMENT

I

THE TRUST NATURE OF THE LANDS GRANTED TO THE WESTERN STATES BY THEIR ENABLING ACTS REQUIRES THAT THE UNITED STATES GOVERNMENT COMPENSATE THE TRUSTS WHEN IT CONDEMNS TRUST LANDS BY MEANS OF ITS POWER OF EMINENT DOMAIN.

This Court has repeatedly determined that the lands ceded to the western states in their Enabling Acts are held by the states in trust for

the citizens of the states, for the purposes specifically described in the Enabling Acts.

In Ervien v. United States, 251 U.S. 41, 64 L.Ed. 128, 40 S.Ct. 75, 1919, this Court strictly construed such a trust:

> There is in the Enabling Act a specific enumeration of the purposes for which the lands were granted, and the enumeration is necessarily exclusive of any other purpose. 251 U.S. at 47.

The Court enjoined the expenditure by the New Mexico commissioner of public lands, of funds derived from the sale and lease of New Mexico trust lands.

A public lands trust was also addressed by this Court in Andrus v. Utah, 446 U.S. 500, 100 S.Ct. 1803 (1980), which construed the Utah Enabling Act of 1894, 28 Stat. 109. This Court described Utah's Enabling Act as follows (at 100 S.Ct. 1807):

> . . . , the school land grant was a "solemn agreement" which in some ways may be analogized to a contract between private parties. The United States agreed to cede some of its land to the

> State in exchange for a commitment by the State to use the revenues derived from the land to educate the citizenry.

The New Mexico-Arizona Enabling Act, 36 Stat. 557, was again at issue in Lassen v. Arizona, 385 U.S. 458, 17 L.Ed.2d 515, 87 S.Ct. 584 (1967), a case which involved the precise issue presented to this Court herein, although with somewhat opposite facts. In Lassen, the Arizona Highway Department was granted material sites and easements for highway purposes across Arizona trust lands without providing compensation to the trust. In the appeal of that determination to this Court, the United States participated as amicus curiae, arguing that the trust must be compensated by the Arizona Highway Department. (In the instant case, the United States has reversed its position, asserting that it need not compensate New Mexico's trust fund for trust lands it has condemned under its power of eminent domain. Note that both Lassen and the instant case construe the New Mexico-Arizona Enabling Act, 36 Stat. 557.)

In Lassen, this Court described the purpose of the trust as follows, at 385 U.S. 463:

> The grant [by the New Mexico-Arizona Enabling Act] was plainly expected to produce a fund, accumulated by sale and use of the trust lands, with which the State could support the public institutions designated by the Act . . . [Congress] intended instead that Arizona would use the general powers of sale and lease given it by the Act to accumulate funds with which it could support its schools.

and at 385 U.S. 466:

> The Enabling Act unequivocally demands both that the trust receive the full value of any lands transferred from it and that any funds received be employed only for the purposes for which the land was given.

This Court then required the Arizona Highway Department to compensate the trust for its easement over trust lands.

The amicus State of South Dakota would submit that the United States government here is in a position easily comparable to the Arizona Highway Department in Lassen, and should be required to compensate New Mexico's trust for

those lands it condemned under its power of eminent domain.

Such compensation must be required to protect the trust established by the New Mexico-Arizona Enabling Act, 36 Stat. 537, against siege by the United States government; to allow otherwise would not only threaten the very foundations of the trust, but would also transgress the plain meaning and intent of the Enabling Act. The trust lands would not be protected and utilized for those purposes explicitly enumerated in the Enabling Act, but would be subjected to usurption by one of the very parties who created the trust and who, by the terms of the Enabling Act itself, is required and mandated to protect the trust: The New Mexico-Arizona Enabling Act expressly requires the Attorney General of the United States to conduct those proceedings necessary to enforce the terms of the Enabling Act. See 36 Stat. 537. Such an attack on the res of a trust by the trustor cannot be tolerated.

II

SEVERAL FEDERAL COURTS, RELYING ON THIS COURT'S PREVIOUS CHARACTERIZATIONS OF THE TRUSTS ESTABLISHED BY THE WESTERN STATES' ENABLING ACTS, HAVE ISSUED DECISIONS WHICH ARE IN CONFLICT WITH THE TENTH CIRCUIT COURT OF APPEALS DECISION INVOLVED HEREIN.

This Court's characterizations of the trusts established by the various Enabling Acts, as described above, have been relied upon in several federal court decisions.

In United States v. 78.61 Acres of Land in Dawes and Sioux Counties, Nebraska, 265 F. Supp. 564 (D. Neb. 1967), the United States District Court for the District of Nebraska addressed the precise issue appealed in the instant Petition; the question presented in that case was whether the Nebraska Legislature (vis-a-vis, a federal court in the Petition here) had the power to grant a right-of-way over trust lands to the United States without compensating the trust. That Court, after consideration of the Nebraska Constitution

and the terms of the original land grant in the Nebraska Enabling Act of 1864, 13 Stat. 47, declared the purported grant of a right-of-way to the United States over trust lands without compensation, void and unconstitutional. Trust lands were held by the state as trustee, and could be disposed of only for the benefit of the cestui que trust. The res of the trust could not be depleted by granting a right-of-way to anyone, including the United States government, without compensating the trust therefor.

United States v. New Mexico, 536 F.2d 1324 (10th Cir. 1976) was a Tenth Circuit United States Court of Appeals decision which addressed the purpose of the grant of trust lands to New Mexico in the New Mexico Enabling Act. The Tenth Circuit Court specifically cited Lassen, supra, and strictly construed the Enabling Act against New Mexico, requiring it to expend trust funds on a Miner's Hospital in compliance with the Enabling Act.

These decisions are both in conflict with the Tenth Circuit Court of Appeals decision brought before this Court herein, which gives no consideration to the New Mexico Enabling Act; they indicate that the nature of the trusts established by the western states' Enabling Acts is in critical dispute.

CONCLUSION

The issue brought before this Supreme Court by the Petition for Certiorari in this matter goes to the very core of the creation of the western states. The various Enabling Acts which ceded certain federal lands to the western states in trust for several purposes, and for the benefit of the citizens of those states, has been breached by the Tenth Circuit Court of Appeals decision herein being appealed. The protection to be afforded the res of the trusts so established in all of the western states has been challenged, and it is this paramount issue that the Court is being asked to resolve.

The amicus State of South Dakota therefore urges that the Petition for a Writ of Certiorari be granted and that the decision of the Tenth Circuit Court of Appeals be reviewed and reversed in light of the arguments proposed herein.

Respectfully submitted,

MARK V. MEIERHENRY
ATTORNEY GENERAL
State Capitol
Pierre, South Dakota 57501

Counsel of Record

ROXANNE GIEDD
Assistant Attorney General